St. George Warehouse *and* Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, Petitioner. Cases 22–CA–23223, 22–CA–23259, and 22–CA–23270

November 17, 2008

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On May 20, 2008, Administrative Law Judge Steven Davis issued the attached Second Supplemental Decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board¹ has considered the Second Supplemental Decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order.

No exceptions were filed to the judge's finding that employee "Sides' search for work began virtually within two weeks of his discharge" and, therefore, that Sides' job search satisfied the requirements of *Grosvenor Resort*, 350 NLRB 1197, 1199 (2007). In the absence of exceptions, Chairman Schaumber adopts the judge's finding. Member Liebman applies *Grosvenor Resort*, a decision in which she did not participate, solely because it represents current Board law.

In adopting the judge's finding the General Counsel carried his burden of adducing evidence that Tharp took reasonable steps to secure interim employment, and that the Respondent failed to carry its burden of persuasion in showing that Tharp failed to mitigate his damages, Chairman Schaumber does not rely on the judge's articulated "assumptions." Rather, he notes that the record reflects that Tharp worked continuously for the Respondent for 6 years; that he promptly initiated a search for employment in New Jersey; that the documentary evidence that does exist shows that Tharp applied with seven different employers in 3 days; that Tharp's mitigation efforts were corroborated to an extent by his mother; and that Tharp promptly secured employment once he relocated to a different job market. Chairman Schaumber further notes that Tharp is unavailable to explain the absence of records relating to his mitigation efforts, that his move to Florida may have complicated the Region's compliance with its obligation to document such efforts, and that Tharp's death obviously precludes him from expounding on the details of his job search. Under the unique circumstances of this case, Member Schaumber agrees that Tharp's estate (or other legal

ORDER

The National Labor Relations Board adopts the recommended Second Supplemental Decision of the administrative law judge and orders that the Respondent, St. George Warehouse, Kearney, New Jersey, its officers, agents, successors, and assigns, shall satisfy the obligation to make whole the following claimants by paying them the following amounts, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.³

Name of Backpay Claimant	Net Backpay
Leonard Sides	\$26,447.90
Jesus (Jesse) Tharp	14,649.79
Total Net Backpay	\$41,097.69

Saulo Santiago, Esq., for the General Counsel. John A. Craner, Esq. (Craner, Satkin & Scheer, P.C.), Scotch Plains, New Jersey, for the Respondent.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On June 23, 2000, the Board issued its Decision which ordered St. George Warehouse, Inc. (Respondent) to make its employees Leonard Sides and Jesse Tharp whole for their losses resulting from the Respondent's unfair labor practices. 331 NLRB 454. On April 23, 2001, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order. 261 F.3rd 493, and on June 5, 2001, the court entered its amended judgment enforcing the Board's Order.

On May 28, 2002, a Compliance Specification was issued, and on October 8, 2002, Administrative Law Judge Margaret M. Kern heard this case in a compliance proceeding where the issue was the amount of backpay owed to Sides and Tharp. Judge Kern noted that the Respondent did not challenge the General Counsel's method of calculating the backpay amounts for the two discriminatees. Certain payments made by the Respondent to both men following their discharges were included in the Specification, for which the Respondent was credited.

At that hearing, the Respondent presented evidence through a vocational employability specialist that there were a sufficient number of relevant jobs advertised as open and available during the backpay period. The General Counsel called no witnesses, and no one testified with any knowledge of the discriminatees'

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), efd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

representative) is entitled to the backpay set forth in the judge's decision

³ Tharp's backpay shall be paid to the legal administrator of his estate or to the person authorized to receive such payment under applicable State law. See *United States Service Industries*, 325 NLRB 485, 487 (1998), citing *ABC Automotive Products Corp.*, 319 NLRB 874, 878 fn. 8 (1995).

actual efforts to find employment. Counsel for the General Counsel relied solely on the amended Compliance Specification to prove her case.

The judge, relying on then current law, held that the entire burden of showing that the discriminatees failed to mitigate their damages rested exclusively on the Respondent, and did not shift back to the General Counsel. Accordingly, the judge found that the Respondent had the burden of showing that there were substantially equivalent jobs within the relevant geographic area and that the discriminatees unreasonably failed to apply for those jobs. Thus, she found that the Respondent, having the burden of production on these issues, had produced no evidence that the two men failed to mitigate their damages by not seeking employment. The judge accordingly ordered the Respondent to pay the full amount of net backpay, as amended, set forth in the amended Compliance Specification.

On September 30, 2007, the Board issued its Decision. 351 NLRB 961. The decision modified the law relating to the burden of proving mitigation of damages. The Board reaffirmed and emphasized that a respondent has the "ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages 'by using reasonable diligence in seeking alternate employment" 351 NLRB 963, citing NLRB v. Mastro Plastics, 354 F.2nd 170, 175 (2nd Cir. 1965). The Board also reaffirmed that the employer has the burden of going forward (the burden of production) with evidence of the availability of substantially equivalent jobs within the relevant geographic area. However, the Board placed on the General Counsel and the discriminatee, but not on the respondent, the burden of going forward with evidence that the discriminatee took reasonable steps to seek employment. The Board therefore held that once the respondent produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, the General Counsel has the burden of producing evidence concerning the discriminatee's job search.

The Board's essential reason for this modification was that the "information concerning the discriminatee's job search is within the knowledge of the General Counsel and/or the discriminatee, and the burden of going forward normally falls on the party having knowledge of the facts involved." 351 NLRB 963.

The Board stated that the General Counsel may meet this burden by producing the discriminatee to testify as to his efforts to seek employment. If, however, it is not possible to obtain the discriminatee's testimony, the General Counsel's burden may be met by providing "other competent evidence" as to the discriminatee's job search, which may be documentary evidence or the "testimony of someone familiar with the discriminatee's job search."

The Board found that at the hearing in this case the Respondent, through the testimony of its employment specialist, met its burden of proving that there were substantially equivalent jobs within the relevant geographic area. The Board held that such evidence was sufficient to shift the burden of production to the General Counsel to come forward with competent evidence regarding the reasonableness of the discriminatees' job

searches

The Board held that the General Counsel and the discriminatees had not met their burden as to their efforts to seek employment because no evidence was presented as to the nature and extent of the job searches. Accordingly, the Board directed that the hearing be remanded and reopened in order to permit the parties to produce evidence as to the job searches.¹

On October 11, 2007, the Board remanded this case to the chief administrative law judge for assignment, and thereafter I was assigned to hear and decide this case. A hearing was held before me on February 26 and March 14, 2008 in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

A. Leonard Sides

Sides was employed by the Respondent for 1-½ years. His backpay period began on March 31, 1999 and ended on September 1, 2000. Sides filed an application for unemployment insurance with the New Jersey Department of Labor on April 18, 1999. His application was denied on the ground that he was not actively seeking work from April 18 through May 1, 1999. On appeal, that determination was overruled with the Appeal Tribunal finding that during that period of time he registered for job placement with the Veterans Administration, made inquiries with friends and associates about job prospects and consulted newspaper classified ads for job openings. It concluded that Sides was able to work, was "available for work and [was] making efforts to become employed." Sides received unemployment compensation from April 18, 1999 through September 23, 1999.

1. Job Referrals by the Department of Labor

On April 29, 1999, Sides registered for work with the New Jersey Department of Labor Employment Service (DOL). Since he was a military veteran, his application was directed to the veterans unit. He was interviewed by Salvatore LoSauro, an employment counselor, as to his experience, education, and capabilities. It was determined that inasmuch as warehousemen's jobs were available he should be referred for such employment rather than retrained in a different field. Sides testified that he visited that office once weekly or twice weekly from April, 1999 to the time of the hearing.

LoSauro testified that his office receives job orders from employers who are actively seeking to hire workers. The job orders list the classification of employee sought, experience required and salary offered. LoSauro matched the job to the applicant and, accordingly, referred Sides to jobs appropriate to

¹ Judge Kern rejected the Respondent's claims that Sides had a medical condition which precluded him from working overtime during the backpay period, and that Tharp improperly removed himself from the New Jersey labor market when he moved to Florida. The Board noted that no exceptions were filed to those findings. 351 NLRB 961 fn. 2. The Respondent renews its claims here, but inasmuch as it did not file exceptions to Judge Kern's finding in the initial hearing it cannot raise those issues here.

his experience. He gave Sides a Job Bank Referral Form for presentation to the prospective employer which asked that the interviewer return it to the Department of Labor. The Form asked such questions as whether the employee appeared for the interview, and whether he was hired or was not qualified. LoSauro stated that some employers do not return the cards to his office, and that he has none of the Job Bank forms for employers to whom he referred Sides, and did not know whether any of them returned the cards to his office.

LoSauro testified that he did not always call the prospective employer to whom the applicant is sent to ask whether the applicant went to the interview, completed an application, or was hired. LoSauro referred Sides to the following jobs. Sides' testified that he visited each company and completed an application, but was not hired:

May 3, 1999 – The Davis Companies.

May 11 – Integro Staffing.

May 14 – Longstreet – forklift operator.

July 6 – Clark Holiday Inn – maintenance.

September 3 – Van Brunt, Inc. – long term (over 150 days) job.

September 13 – The Wiz – long term job.

September 21 – Consumer Plastics – long term job.

September 30 – General Motors Corp. – long term job.

As to the referral to Van Brunt, above, the Respondent produced a letter dated October 7, 2002 from Dennis LaSalle, Van Brunt's warehouse manager. The letter stated that La Salle did not sign the Job Bank Order Form, noting that he always signs and returns the cards to the job bank when given by an applicant. He concluded that his records show no application for employment by Sides on file, "but reminder, that was back on September 9, 1999." Sides insisted that he went to Van Brunt and filed an application there.

Although he does not follow up with the prospective employer, LoSauro asks the applicant whether he went to the interview and for the results of the interview. However, he could not recall whether Sides told him whether he went to any of these jobs and did not recall Sides' answers to any questions he asked about the interviews. Nevertheless, LoSauro called Sides a "very active job searcher."

2. Independent Search for Work

Sides' main experience is as a forklift operator. In September, 1999, he took a class arranged by the DOL given by the National Safety Council and received a certificate as a forklift operator.

In addition to his registration with the DOL, and referrals by that agency, Sides stated that he searched for work by looking at the classified advertisements in the Newark Star Ledger and the free newspapers having employment guides which are distributed on the street. He credibly testified that as to certain ads requiring a response by fax or e-mail he used those facilities at the DOL.

He testified that his job searches and the locations of jobs he would accept were necessarily limited by travel distances since he does not own a car and therefore must travel by bus or train to search for work. He limited his search to a 25 mile radius

from his home—which was the distance from his residence to the Respondent's facility. He also walks to prospective jobs located within a one-half to one mile from his home.

Sides was referred by friends for work at Labor Ready and J & J Staffing Resources, Inc., both temporary staffing agencies. He worked for Labor Ready from October 25, 1999 to November 26, 1999, and at J & J from November or December, 1999 through about March 12, 2000. He was sent by those agencies to jobs at various employers needing temporary help, and he worked for as long as he was assigned, mostly two to five days per week. His jobs with those agencies ended when the jobs he worked on were completed. He did not work during the backpay period after his job with J & J ended on March 12, 2000. Nevertheless, as set forth below, he looked for work while employed by J & J inasmuch as work with that company was not full-time or steady, but involved being sent to other companies on a temporary basis.2 Sides earnings at Labor Ready and at J & J were included in the Specification and there is no dispute concerning those computations.

In March, 1999, Sides began preparing a list of jobs he applied to, most with street addresses but all with their cities named, at which he searched for work, filed applications for employment but was not hired, as follows:³

Between March, 1999 and October, 1999:

A. Duie Pyle Trucking, Carteret – Newark Star Ledger Vantage, Carteret – Star Ledger.

Later Searches for Work:

General Motors, Linden.

January 17, 2000 – TSI Containers, Avenel – Star Ledger.

January 24 – Merck, Rahway – janitorial – referred by a friend. Received a response that he was overqualified.

January 31 – General Motors, Linden – dockwork; forklift - referred by a friend.

February 7 – Purepac – Star Ledger.

February 14 – Ogden, Rahway – forklift; warehouse.

February 22 – Lancome, Clark – forklift – received a response that his application was being reviewed.

February 29 – Linden Motor Freight, Linden – forklift - Star Ledger.

February 29 – Vantage Distribution, Avenel – forklift.

March 9 – Inplant Packaging Systems, Metuchen – forklift – Star Ledger - (spoke to Mike Sheperd).

March 21 – Concorde Beverage Corp., Elizabeth – forklift - faxed resume.

March 22 – L'oreal–Cosmair, Clark – forklift – Star Ledger. Faxed resume. Received a written reply stating that his resume was received.

March 28 - Consumer Plastics, Inc., Rahway - (spoke to Bob).

March 28 – GSI, Carteret (spoke to George) – Star Ledger.

April 3 – Swim and Play, Rahway - forklift (spoke to Miss Egan) – Star Ledger.

April 27 - G & W Laboratories, Inc., South Plainfield - fork-

² Sides did not look for work while employed by Labor Ready.

³ Sides' testimony as to how he became aware of each job is noted.

lift – faxed resume – Star Ledger.

May 15 – Ultimate Juice Company, Newark – forklift – Star Ledger - faxed resume.

June 5 – L'oreal-Cosmair, Clark – forklift. Star Ledger - Received a written reply stating that his resume was received.

June 12 – U.S. Gypsum, Clark – forklift – faxed resume. Sides took a test on June 19 and was interviewed on June 26. In early July he was informed in writing that he was not being considered for the job.

July 10 – Q. Logistics, Atlanta (job was in New Jersey) – Star Ledger – e-mailed resume.

July 17 – L'oreal-Cosmair, Clark – forklift – Star Ledger. Received a written reply stating that his resume was received.

July 17 – Yellow Freight Systems, Elizabeth – forklift – Star Ledger.

Early August - Filled out application at Source One temporary agency - Star Ledger - Sides was hired and began work on September 5 after the end of the backpay period.

On October 3, 2002, the Respondent sent a letter to certain companies set forth above, inquiring whether Sides had applied for employment. Replies were received as follows:

Vantage – The letter was returned with the envelope marked "no such street."

General Motors – "information not available."

Concorde Beverage Corp. and Consumer Plastics – The envelopes were returned marked "moved; left no forwarding address"

Inplant Packaging Systems – "I believe Mr. Sides did approach me for a job around this time. We were not hiring and thus he has not worked for us."

Ultimate Juice Company – "I joined Ultimate Juice Company in September 2001 and do not have any record of Mr. Leonard Sides Jr. applying for a job with us nor do I believe that UJC was recruiting at that time."

Yellow Freight Systems – "No application/resume on file at the Elizabeth, NJ facility."

Purepac – "Our company's policy is to maintain resumes and employment applications for a period of one year only. However, upon receipt of your [letter] we commenced a search of our files and have been unable to locate any reference to your Leonard Sides, Jr."

Linden Motor Freight – "Our records going back to that date are no longer available."

The Wiz, GSI, Swim and Play, G & W Laboratories, Inc., Merck, Ogden - no response to the letters was received.

Sides testified concerning the evidence presented by the Respondent's employability specialist concerning advertisements in the Newark Star Ledger. According to the Respondent, the April 4, 1999 issue of the Star Ledger listed 35 ads for warehouse jobs. Sides explained that he did not apply to some listed jobs because they were located outside the area to which he could readily travel by walking or by public transportation. He stated that he may have phoned some of the companies listed to find out were they were located and to ask about transportation. He did not make a list of the companies he phoned since he was not told to do that. He stated that he was only asked to record those jobs that he applied to for work.

B. Jesus (Jesse) Tharp

Tharp had been employed by the Respondent for nearly six years at the time of his discharge. His backpay period began on March 16, 1999 and ended on September 1, 2000. On March 17, Tharp applied for unemployment compensation, listing on his application his work experience as a forklift operator, yardman, routing clerk, checker, and receiving clerk with computer experience. He stated on the unemployment insurance claim form that he was presently ready, willing and able to work full time, and if offered a job he could begin work at once.

Tharp received unemployment insurance checks from May 1, 1999 through June 26, 1999, at which time, apparently, his checks stopped because it was determined by that agency that he was discharged for misconduct. He completed an NLRB backpay questionnaire dated June 24, 1999, which noted that he never quit a job or was fired from a job since leaving the Respondent, and was not unavailable for work for any reason. The form listed no companies for which he had worked since his discharge. However, he listed seven companies and their street and city addresses at which he searched for work, and the results of such search, as follows⁴:

June 24 - R & J Trucking - not hiring

June 24 – Mearthy Trucking – not hiring (Eddie)

June 25 – Vics Trans, S. Kearny – not hiring (Bettsie)

June 25 – Unitade Supply Co. – not hiring

June 25 – Quatum Express – not hiring (Trish)

June 28 – Worldwide Frt. – not hiring (Ilene)

June 28 – Ship to Shore Trans – not hiring (Bob)

Tharp was deceased at the time of this hearing and thus was unavailable to testify. His mother, Gail Moskus, testified, however. She stated that she was living in Naples, Florida at the time of her son's discharge from the Respondent. One week following his discharge he told her that he had been fired. Thereafter, they spoke twice per month.

During their conversations, Tharp told his mother about his search for work in New Jersey, telling her that he was "out looking for employment" but could not find work. Moskus was certain that her son told her where he was looking for work but since those conversations took place nine years before this hearing, she could not remember the specifics. She believed that he did look for work "every day," noting that he liked to work, he was "used to working" and had to work in order to support himself. Indeed, his unemployment insurance claim form noted that he was the "main wage earner" in his household, and Moskus stated that he was unmarried. Moskus stated that her son did not own a car and traveled to work and looked for work using bus transportation.

⁴ The Respondent correctly notes that if the form was completed and mailed to the Regional Office on June 24, Tharp could not have known that he looked for work on June 25 or 28. Clearly, the fact that the form was *dated* June 24 does not mean that it was completed or sent on that date. It may have been dated on June 24 but the entries may not have been completed until June 28.

⁵ Her name was improperly noted in the hearing transcript as "Mastes."

Moskus recalled that Tharp was becoming very discouraged at his failure to find work. She sent him about \$200 to \$300 in increments of \$50 while he was unemployed, and in about July, 1999, she suggested that he relocate to Naples, Florida where work was available and he would be near his relatives who could help him find work. Tharp agreed. Regional office compliance officer Collette Sarro testified that Tharp told her that he could not find a job in New Jersey and could not afford to live in that state, and was moving to Florida.

In late August or early September, 1999, Moskus flew to New Jersey and stayed with her son for about one week. They then drove to Florida. While Moskus was in her son's apartment, she did not see him look for work in New Jersey since they were busy packing up to leave. However, she saw many newspapers in the apartment, and noted that he bought a newspaper each day.

Tharp moved in with his mother in Naples. Moskus stated that it took about two weeks for her son to get settled there, and then he looked for work. She testified as to Tharp's search for work. She saw him read the help-wanted ads in the newspaper, and believed that he applied for jobs that he found in the paper. She stated that in about September, 1999 he applied for a fork-lift driver's job at a marina near her home on Bayshore Boulevard. He also applied for a warehouseman's job at HEWS, a lighting company on Airport Road in Naples. She drove him to that job and he showed her the application he completed. He also applied to other companies whose names she could not recall.

Finally, he applied for a yardman and forklift driver's job at Naples Lumber & Supply Company on October 18, 1999 and was hired the next day. He worked there through the end of his backpay period, September 1, 2000. Naples Lumber was his first job after arriving in Florida. Tharp's earnings at Naples Lumber were included in the Specification and there is no dispute concerning those computations.

II. ANALYSIS AND DISCUSSION

A. General Principles

To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) (citations omitted).

Even though a discriminatee must attempt to mitigate her loss of income, the discriminatee is held only to a reasonable rather than to the highest standard of diligence. *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995).

The sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period. *Grosvenor Resort*, 350 NLRB 1197, 1197 (2007).

B. Leonard Sides

It is clear that Sides engaged in a diligent, continuous search for work. He utilized several different avenues in his search. He filed an application for unemployment insurance on April 18, 1999, two weeks and four days after his discharge.

A discriminatee need not "instantly seek new work; rather the test is whether, on the record as a whole, the employee has diligently sought other employment during the entire backpay period." Saginaw Aggregates, Inc., 198 NLRB 598, 598 (1972). However, if the discriminatee unreasonably delays an initial search, the Board will toll backpay for that period and will start backpay if and when a reasonably diligent search begins. Marlene Industries Corp., 183 NLRB 50, 54-55, 59 (1970). Generally, the Board has determined that it is not unreasonable for a discriminatee to begin his search for work within the twoweek period following his discharge, and that if a search for work has begun in that period of time, backpay runs from the date of the discharge, Grosvenor Resort, 350 NLRB 1197, 1199 (2007). Here, Sides' search for work began virtually within two weeks of his discharge, and continued throughout the backpay period.

The Board has stated that "registration with a state unemployment office is prima facie evidence of a reasonable search for employment." *Avery Heights*, 349 NLRB42, 47 (2007); *Bauer Group*, 337 NLRB 395, 399 (2002); *Cassis Management Corp.*, 336 NLRB 961, 968 (2001); *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996). Accordingly, Sides' registration with the New Jersey unemployment office without more establishes that he engaged in a reasonable search for work.

Sides also registered with the New Jersey Department of Labor. He extensively utilized the services of that office in an effort to find employment. He faxed and e-mailed resumes to companies which advertised for help. He took a certification course in forklift operation arranged by that office in order to meet insurance companies' requirements that forklift operators be certified. He prepared a professional resume which set forth his experience and qualifications. Such efforts clearly show that he was preparing to resume work in his main occupation and not to remain idle.

The DOL referred him to eight jobs, all of which, I find according to his credited testimony, he visited. As to the referral to Van Brunt, the letter from the warehouse manager does not constitute proof that Sides did not apply for that job. It is particularly noteworthy that the manager said that any application would have been made more than three years before his reporting on Side's alleged visit.

In addition to his registrations with those two agencies, Sides conducted an independent search for work. He looked for work in newspapers, visited prospective employers and asked his friends if they knew of any companies who were hiring.

The fact that he limited his search to places he could travel to by public transportation or by foot is reasonable and understandable. A discriminatee cannot be required to purchase or lease a car or take a taxi if he is unable to afford those means of transportation. The Board has recognized that the "individual circumstances" of the discriminatee must be taken into consideration in determining whether he has exercised reasonable diligence when searching for interim work. Such factors include "limited transportation." *Grosvenor Resort*, 350 NLRB 1197 (2007) and "personal limitations." *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Further, Sides traveled by pub-

lic transportation to work with the Respondent so his search for jobs with that limitation is consistent with his obligation to obtain comparable work.

Sides also asked his friends for sources of work and in fact obtained the two temporary agency jobs, Labor Ready and J & J from his friends' suggestions. The fact that he accepted work at these agencies, although he would have preferred full time work demonstrates that he conscientiously sought to work. It is also significant to note that he sought permanent employment and continued to seek such employment even after he was hired by the temporary agencies. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996).

His work at those two agencies continued as long as there was work for him. His work there ended only when his assignments ceased. Importantly, Sides looked for work even while he was employed at J & J. The records establish that he applied for work at a total of 13 prospective employers in January, February and March, 2000 while he was engaged in temporary work at J & J.

Sides further exhibited his diligence in seeking work by applying to 25 jobs from March, 1999 to August, 2000. The Respondent questions whether he actually applied for such jobs, but the detail provided in his listings of jobs applied for was extremely thorough and therefore his testimony that he actually made such applications must be credited. Thus, the listings noted how he became aware of the job, the names of the employers, their addresses, cities, types of work applied for, the names of the interviewers he spoke to, and responses from these prospective employers. Such specific information establishes that he did, as he credibly testified, apply for work at all the listed companies.

Thus, he received written responses from Lancome/L'oreal that his three applications were being considered. He also received a letter from U.S. Gypsum confirming that he applied for work on June 19, 2000, took a skills assessment test and was interviewed, but a position was not offered to him. Significantly, a letter from Inplant Packaging stated that the writer believed that Sides asked for work but the company was not hiring at that time. Such documentary evidence establishes that Sides actually applied for work at these companies, and strongly supports a finding that he applied at all the companies he testified about.

As noted above, the Respondent wrote to certain companies seeking confirmation that Sides applied for work. The letters were sent two to two and one-half years after Sides' applications were made. None of the responses that the Respondent received to its inquiries show that Sides did not make such applications. As to those marked "moved left no forwarding address" the passage of time may account for such a notation. Others said they had no information or the records were too old to have been retained. Such evidence does not prove that Sides did not apply to those companies.

The Respondent's argument in its brief (p. 10) that employers Ultimate Juice, Yellow Freight and Purepac denied that Sides had applied for work is overstated. Those companies simply stated that they had no record of Sides applying for a job, or had no application from Sides in its files. That does not mean that Sides did not apply. It only means that no application

had been located.

The Respondent argues that Sides' search for work demonstrates that there were certain periods of time that he did not look for work. But the Board has stated that "after an employee has been discriminatorily discharged, and while unemployed, he is not required to spend 8 hours a day, 5 days a week searching for work" Baker Electric, 351 NLRB 515, 535 (2007). "The entire backpay period must be scrutinized to determine whether throughout that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss." Cornwell Co., 171 NLRB 342, 343 (1968).

The evidence establishes that Sides conscientiously searched for work using many available methods. It is clear that he made an honest, good-faith effort to find employment, registering with two agencies, visiting prospective employers, faxing and e-mailing his resume to others, and actually working during the backpay period at two temporary agencies. Taking into consideration his "individual circumstances," particularly his limitations to job locations because of his use of public transportation, his search was diligent, sufficient and reasonable.

Jesse Tharp

The remedy of reinstatement and backpay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public, They are not private rewards operating by way of penalty or of damages. *Clayton-Willard Sales*, 126 NLRB 1325, 1326–1327 (1960).

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), the Supreme Court affirmatively noted that the Board has not mechanically applied its backpay remedies, but has striven "to attain results in diverse, complicated situations" to effectuate the purposes of the Act.

In assessing Tharp's search for work and consistent with the above principles, I cannot ignore the unique circumstances presented here or mechanically apply legal doctrine. I must view his search in the context of ensuing events including his death prior to the Board's decision modifying the discriminatee's burden of proof.

The Respondent is correct that Tharp was instructed to record, in writing, his search for work. Tharp's written record of his search for work is sparse. However, the record supports a finding that he did engage in a diligent search for work. Thus, only one day after his discharge he applied for unemployment insurance. "Registration with a state unemployment office is prima facie evidence of a reasonable search for employment." *Avery Heights*, 349 NLRB 42, 47 (2007), and cases cited above. That single act shows that he was not content to sit back and be idle. He affirmed in his application for unemployment compensation that he was ready willing and able to work full time immediately. Accordingly, Tharp's registration for unemployment insurance, without more, establishes that he engaged

in a reasonable search for work.

Tharp wrote on the Board's compliance questionnaire that he applied to work at seven jobs in the space of three days. He listed the names of five people he spoke to at the seven prospective employers. I credit mother Moskus' uncontradicted testimony that Tharp told her that he was searching for work, and he mentioned the businesses he visited. It is understandable that she could not remember the specifics of his search in New Jersey because of the passage of nine years since her conversations with her son. Compliance officer Sarro also testified that Tharp told her that he could not find work in New Jersey.

I find that Tharp engaged in a reasonable, diligent, good-faith effort to find work in New Jersey. I credit his mother's testimony that he told her the places he looked for work, which was supported by his notation that he applied for positions at seven prospective employers and his registration for unemployment compensation.

In arriving at this finding I make two assumptions which I believe are founded in logic. First, a mother knows her child, perhaps better than anyone else. The fact that Tharp began work at the Respondent at age 23 and was employed there until he was unlawfully fired at the age of 29 shows that he had a strong work ethic. Moskus' testimony that Tharp had to work to support himself and always worked are completely believable. The fact that he searched for work diligently in Florida, found work there very quickly and worked at the same job until the end of the backpay period and thereafter is strong evidence that he conscientiously searched for work after his discharge in New Jersey and until he moved to Florida. What is required is that Tharp's efforts be "consistent with the inclination to work and to be self-supporting." Airport Park Hotel, 306 NLRB 857, 861 (1992). I find that his efforts were consistent with such an inclination as demonstrated by his long work record at an early age and the fact that he had to be self-supporting.

The second assumption I make is that, as a young man, Tharp would have preferred to live independently earning his own way and would not have wanted to move in with his mother in another state. However, he apparently had no choice. He had to move to Florida because, after about five months he could not find work in New Jersey and was forced to live with his mother in Florida and search for work there. It seems clear that if he found work in New Jersey he would have accepted such work and remained in that state and continued to live independently.

I accordingly find that Tharp, based on his need to work and his work ethic as expressed by his mother and proven by his long tenure at the Respondent, and the fact that Tharp told his mother that he was looking for work and told her the names of the businesses he applied to, made a reasonable, diligent, honest effort to find work in New Jersey. I also find that Tharp engaged in a diligent search for work in Florida. Mrs. Moskus testified as to specific prospective employers and locations she drove him to in Florida. He found and obtained a job quickly, after only about one month after his arrival in that state. He remained employed at that job through the end of the backpay period and thereafter. If he diligently searched for work in Florida he must have made the same effort in New Jersey.

There is another aspect of this case which lends support to a

finding that Tharp conducted an honest, reasonable and diligent search for work. At the time of the initial compliance hearing in 2002, counsel for the General Counsel apparently believed, based on then current law, that producing Tharp and having him testify was not necessary to prove her case. The Board's decision in this case modifying the law by placing the burden on the discriminatee to prove his search for work was issued seven and one-half years after Tharp's unlawful discharge. The decision was issued at a time when Tharp was deceased. Not only was Tharp not available to testify, but apparently due to the passage of time, his mother could not recall what he told her concerning specific places he looked for work.

I do not believe that it would be appropriate or fair to the innocent, unlawfully discharged employee to require, in the circumstances of this unique case, more specific evidence of Tharp's search for work than has already been provided. "Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent." *Midwestern Personnel Services*, above.

Accordingly, because of the unique circumstances of this case, I believe that a finding is warranted that the General Counsel has established that Tharp conducted a reasonable search for employment, and has satisfied his obligation to seek interim employment.

C. The Respondent's Expert

I have carefully considered the testimony of Donna Flannery, the Respondent's employability expert and the documentary evidence presented in connection with her testimony. Her report, prepared in August, 2002 and received in evidence at the October, 2002 hearing, involved an analysis of the labor market which existed within a 25-mile radius of the Respondent's facility, and the labor market outlook in the entire state of New Jersey. Her report included samples of newspaper advertisements she examined. A separate exhibit consisting of the ads was received in evidence. The exhibit comprised a ¾ inch thick stack of newspaper ads for warehouse workers, including fork-lift operators which appeared in the Bergen Record and the Newark Star Ledger during the backpay period.

Flannery concluded that a "sufficient number of jobs existed within the identified labor market for positions such as Warehouse Worker, Forklift Operator, and other similar jobs during the time period of April, 1999 through September, 2000. The research demonstrated that a significant number of job postings were advertised as open and available during this time period." She also gave her opinion that neither Sides nor Tharp made a "diligent effort to seek and obtain new employment [J]ob efforts did not even consist of a minimal amount of effort to locate employment." She stated that the advertisements could have been reviewed for openings, and offered the opinion that there were many free resources available, such as library reference material and internet jobsites which the discriminatees could have utilized to locate jobs.

The Board has generally given little weight to such evidence. "It avails a Respondent nothing to introduce a batch of newspaper ads... Such advertisements of jobs in newspapers generally are irrelevant, and are so here, because the evidence does not show, for example, whether the jobs would have been available

had [the discriminatees applied, nor whether [the discriminatees] would have been hired had [they] applied." *Bauer Group*, 337 NLRB 395, 398 (2002); *Groves Truck & Trailer*, 294 NLRB 1, 5 (1989).

Flannery did not speak with Sides or Tharp and did not contact any of the employers who advertised for help. In *Parts Depot, Inc.*, 348 NLRB 152, 152 fn. 6 (2006), the Board stated that, on "numerous occasions [the Board] has refused to rely on expert testimony, similar to that offered here, where the expert is only 'referring to the probability of job opportunities, not to a given individual's situation' and he 'forms his opinions' about the claimant without having any personal knowledge of the latter's personal circumstances." See *United States Can Co.*, 328 NLRB 334, 343 (1999); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991).

Here, Flannery did not consider the unique circumstances that limited the opportunities of Sides and Tharp such as the necessity that any jobs they would consider must be accessible by public transportation or within walking distance from their homes. Indeed, when asked about certain of the ads, Sides testified that he may have called some advertisers and learned that the jobs were located outside his ability to travel. Other ads had addresses listed which he immediately believed were too far for him to travel. It must be noted, however, that Sides did apply to advertised jobs. Thus, as set forth above, he applied to 16 jobs advertised in the Newark Star Ledger.

CONCLUSIONS

The Respondent has the "ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages 'by using reasonable diligence in seeking alternate employment" St. George, 351 NLRB 961, 963. As set forth above, based on the evidence set forth in the initial and remanded hearings, I find that Leonard Sides and Jesse Tharp have each made diligent, reasonable searches for work. I therefore conclude that the Respondent has not met its burden of proving that Sides and Tharp did not use reasonable diligence in seeking alternate employment. I accordingly find and conclude that they are entitled to the backpay amounts set forth in Judge Kerns' decision as set forth below.

Based on the above, I issue the following recommended⁶

ORDER

The Respondent, St. George Warehouse, Kearney, New Jersey, its officers, agents, successors, and assigns, shall make the following employees whole by paying to them the sums set forth below, with interest on such amounts to be computed thereon in the manner prescribed in the Board's Decision and Order and making the appropriate deductions from said amounts of any tax withholdings required by state and federal laws:

Leonard Sides: \$26,447.90. Jesus (Jesse) Tharp: 14,649.79.

Inasmuch as Tharp is deceased, the backpay due him shall be paid to the legal administrator of his estate or to any person authorized to receive such payment under applicable state law. *United States Service Industries*, 325 NLRB 485, 487 (1998).

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.